COPY

FILED
JAN 6 1954
HAROLD B. WILEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 115

WILLIAM FORREST TRAFTON,
Appellant,

vs.

STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

HARRY S. POLLARD,
Littlefield Bldg.,
Austin, Texas,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	2
Questions presented	3
Statutes involved	4
Statement of the case	5
The questions are substantial	7
Appendix "A"—Opinon of the Court of Criminal Appeals, Opinion on motion for rehearing, Opinion of the Court of Civil Appeals in case of *Department of Public Safety* v. *Buck* and also opinion of motion for rehearing	12
Appendix "B"—Applicable statutes	24

Table of Cases Cited

Cline v. *Frink Dairy*, 274 U.S. 445, 71 L. ed. 1146	8
Connally v. *General Construction Co.*, 269 U.S. 385, 70 L. ed. 322, 46 S.Ct. 126	8
Department of Public Safety v. *Buck*, 256 S.W.(2d) 642	1, 6
Herndon v. *Lowry*, 301 U.S. 252, 57 S.Ct. 732, 81 L. ed. 1066	2
Jordan v. *De George*, 341 U.S. 223, 95 L. ed. 886	8
Kavacs v. *Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L. ed. 513, 10 A.L.R.(2d) 608	7
Lanzetta v. *New Jersey*, 306 U.S. 451, 83 L. ed. 888, 59 S.Ct. 618	8
Local 333 United States Marine Division of International Long Shoremens Association v. *Battle*, 342 U.S. 880, 72 S.Ct. 178, 96 L. ed. 661	2
Musser v. *Utah*, 333 U.S. 95, 92 L. ed. 562, 68 S.Ct. 397	8
Omaechevarria v. *State of Idaho*, 246 U.S. 343, 38 S.Ct. 323, 62 L. ed. 763	7

Page

People of State of New York, ex rel. Bryant v. *Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L. ed. 184 ... 2

United States v. *Cohen Grocery Co.*, 255 U.S. 81, 65 L. ed. 516, 41 S.Ct. 298 ... 8, 9

Ward v. *Krinsky*, 259 U.S. 503, 42 S.Ct. 529, 66 L. ed. 1033 ... 2

Waters-Pierce Oil Co. v. *Texas*, 212 U.S. 86, 53 L. ed. 417, 29 S.Ct. 220 ... 9

Winters v. *People of the State of New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L. ed. 840 ... 2

STATUTES CITED

Acts of Texas Legislature of 1947, Section 134a, 50th Legislature, page 967, Chapter 421 (Section 134a of Article 6701d, Vernon's Annotated Civil Statutes of Texas) ... 4

Constitution of Texas, Article I:

Section 10 ... 3
Section 19 ... 3

Constitution of the United States, 14th Amendment ... 2, 3, 8

Penal Code of Texas:

Article 6 ... 3
Article 797 ... 4

United States Code, Title 28, Section 1257(2) ... 2

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 26,542

EX PARTE: WILLIAM FORREST TRAFTON

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, Appellant William Forrest Trafton submits herewith his statement particularly disclosing the basis upon which the United States Supreme Court has jurisdiction on appeal to review the final judgment of the Court of Criminal Appeals of Texas entered in this cause.

Opinions Below

The opinions of the Court of Criminal Appeals herein have not been reported and will not be reported, pursuant to the rules of that court, until issuance of a mandate herein. Copies of the original opinion, the opinion on Motion for Rehearing, and of the final judgment of the Court of Criminal Appeals overruling Appellant's Second Motion for Rehearing are attached hereto as *Appendix "A"*, together with the opinion in *Department of Public Safety* v. *Buck*, (Tex. Civ. App., 1953), 256 S. W. (2d) 642, Er. Ref., re-

ferred to in the original opinion of the Court of Criminal Appeals herein.

Jurisdiction

The final judgment of the Court of Criminal Appeals of Texas, the highest court of Texas in which a decision herein could be had, was entered on February 10, 1954. A petition for appeal is presented herewith to the Court of Criminal Appeals, this 10th day of May, 1954.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257 (2). The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment on direct appeal in this case: *Local 333B United Marine Division of International Long Shoremans Association* v. *Battle*, 342 U. S. 880, 72 S. Ct. 178, 96 L. Ed. 661; *Winters* v. *People of State of New York*, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840; *Herndon* v. *Lowry*, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066; *People of State of New York, Ex Rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184, *Ward* v. *Krinsky*, 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033.

The Court of Criminal Appeals by written certificate has certified that the federal question involved in this appeal was properly raised by appellant, considered by the Court, and was necessary to a determination of this cause; and was determined by the Court of Criminal Appeals adversely to the contentions of appellant that the statutes involved herein are repugnant to the 14th Amendment of the United States Constitution.

By motion to quash complaint and oral argument in the Corporation Court of the City of Austin (Tr. p. 7), by application for writ of habeas corpus and oral argument thereon in the 98th Judicial District Court of Travis

POOR COPY

County, Texas (Tr. p. 4), and by written briefs and oral arguments in the Court of Criminal Appeals, appellant assailed the statutes involved here as being of such indefiniteness as concerns the amount of exhaust noise which is lawful or which is "excessive and unusual noise" and as concerns the character and quantity of exhaust smoke which is "annoying smoke" that each statute is repugnant to the 14th Amendment of the United States Constitution and to Sections 10 and 19 of Article I of the Texas Constitution and to Article 6, Penal Code of Texas. The Corporation Court overruled the Motion to Quash and the Appellant excepted (Tr. p. 8). The District Court judgment on habeas corpus expressed the opinion that the muffler statutes are void for indefiniteness but denied the relief sought by Appellant as relator and Appellant duly excepted and appealed to the Court of Criminal Appeals of Texas (Tr. 13); and the Court of Criminal Appeals affirmed the District Court judgment holding that each of the muffler statutes is constitutional, as being sufficiently definite with respect to the amount and character of exhaust noise and exhaust smoke prohibited by such statutes, under both the United States Constitution and the Texas Constitution.

Questions Presented

A concise summation of the questions presented is:

(a) Since all motor vehicles equipped with mufflers in good working order necessarily make some exhaust noise, how much of "some" noise is legal and usual and how much of some noise is "excessive or unusual"?;

(b) Since all motor vehicles equipped with mufflers in good working order necessarily permit some exhaust smoke what quantity and type of exhaust smoke is "annoying" smoke?

Formally stated, the questions involved here are:

(1) Whether the motor vehicle muffler statutes of Texas, which penalize every operator of any motor vehicle equipped with a muffler which does not prevent "excessive or unusual noise" or "annoying smoke", are sufficiently definite in themselves, or as construed by the Court of Criminal Appeals herein, so that persons of ordinary intelligence who are affected by such muffler laws may know with reasonable certainty what standard of conduct is required to comply with such statute.

Statutes Involved

The statutes involved are brief and are as follows:

Article 797, Penal Code of Texas:

> "Every motor vehicle must have devices in good working order which shall at all times be in constant operation to prevent excessive or unusual noises, annoying smoke, and the escape of gas or steam. Pipes carrying exhaust gas from the engine shall be directly parallel to the ground or slightly upward. Devices known as 'Muffler cutouts' shall not be used within the limits of any incorporated city or town or on any public highway where the territory contiguous thereto is closely built up. Any person violating any provisions of this article shall be fined not to exceed one hundred dollars."

Section 134a, Acts of 1947, 50th Legislature of Texas, page 967, Chapter 421 (Section 134a of Article 6701d, Vernon's Annotated Civil Statutes of Texas):

> *Mufflers, prevention of noise,* Sec. 134. (a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway."

BLEED THROUGH POOR COPY

Statement of the Case

Appellant herein, William Forrest Trafton, was charged by complaint in the Corporation Court of the City of Austin, Texas, with violation of the Texas muffler statutes involved herein. The proof showed that his vehicle was equipped with a muffler which had not been altered, modified, or damaged in any manner but that the arresting officer was of the opinion that the muffler on appellant's automobile did not prevent excessive and unusual noise and annoying smoke. Appellant was found guilty by the court without a jury and assessed a fine of $5.00, which appellant declined to pay, and he was committed to the custody of the Chief of Police. Appellant then applied for a writ of habeas corpus to the 98th Judicial District Court of Travis County, Texas, which was granted, but after a hearing before the court, judgment was rendered reciting that the court was of the opinion the Texas muffler statutes involved were unconstitutional and void because of their indefiniteness but remanded Trafton to the custody of the Chief of Police. Trafton duly excepted to the District Court judgment, gave notice of appeal to the Court of Criminal Appeals and perfected his appeal.

The District Court judgment was affirmed by the Court of Criminal Appeals by its original opinion and judgment dated November 25, 1953, the opinion reciting that the terms "excessive and unusual noise" as contained in the muffler statutes mean:

> "Noise in excess of the usual noise which would necessarily result from the operation of a motor vehicle when reduced to the minimum by a muffler . . ."

and

> "The extent to which the exhaust noises of a motor vehicle may be reduced without serious impairment

of the efficiency of a motor is a question for experts in that field."

Appellant's timely motion for rehearing was overruled by the Court of Criminal Appeals in its opinion and judgment dated January 13, 1954, the Court stating in such opinion:

> "In this day and time with millions of automobiles equipped with internal combustion engines traveling on the streets every hour throughout the day and night all over the country, it seems to us that practically all persons are familiar with the common sound of automobiles as the explosions utilized therein pass through the ordinary muffler. If it be a matter of common knowledge as to what those sounds are, measured by one's power of listening and not by the results of technical measurements, then we think that any person should know what the usual noise is that is made by such motors. If it be a matter of common knowledge, then the unusual noise could be established by any person familiar with the usual noise.
>
> "We think this matter should be evidenced by any person familiar with the sound of an automobile as it is propelled upon the streets or highways by its own internal combustion."

Appellant's timely second motion for rehearing was overruled by the Court of Criminal Appeals, without written opinion, by its final judgment entered February 10, 1954.

Department of Public Safety v. *Buck* (Tex. Civ. App., 1953) 256 S. W. (2d) 643, Er. Ref. cited in the original opinion of the Court of Criminal Appeals herein was a declaratory judgment action under the Texas Uniform Declaratory Judgment Act to obtain a declaration as to

(a) Whether a specified type of motor vehicle muffler prevented "excessive and unusual noise and annoying smoke" within the meaining of the Texas muffler statutes; and

POOR COPY

(b) Whether the Texas muffler statutes are repugnant to state and federal constitutional provisions because of their indefiniteness as to what amount of exhaust noise and exhaust smoke constitutes "excessive and unusual noise and annoying smoke", and what amount of exhaust noise and smoke is lawful.

The District Court judgment declared:

(a) That the specified mufflers did not cause or permit excessive or unusual noise or annoying smoke if the mufflers were not altered, modified or damaged;

(b) That the muffler statutes were unconstitutional because of their indefiniteness.

The Court of Civil Appeals held that the muffler statutes are definite and valid, stating: "We think any ordinary and interested person would have no difficulty in determining whether or not an excessive and unusual noise or offensive or excessive exhaust fumes accompanied the operation of a motor vehicle," citing *Omaechevarria* v. *State of Idaho*, 246 U. S. 343, 38 S. Ct., 323, 325, 62 L. Ed. 763. *Kavacs* v. *Cooper* 336 U. S. 77, 69 S. Ct. 448, 449, 93 L. Ed. 513, 10 A. L. R. (2) 608.

The Questions Are Substantial

The Texas muffler statutes involved herein are applicable specifically to operators *of all motor vehicles*, without regard to type, class, or other distinction, including motor scooters, motorcycles, passenger vehicles, and all types and sizes of trucks powered by motors, both gasoline and diesel. Identical penal muffler statutes, or statutes of almost identical verbiage, are now in effect in nearly all of the other states. The muffler statutes of thirty-seven other states are attached hereto as *Appendix "B"*. Insofar as the undersigned counsel for Appellant can determine after

careful search in the Law Digests and inquiries of the Attorneys General of the states whose laws are contained in attached Appendix B, the opinion of the Texas Court of Criminal Appeals in the present case is the first expression of any appellate court, State or Federal, in the United States with respect to the constitutionality of any of these muffler statutes, under a State Constitution or under the 14th Amendment of the United States Constitution.

It seems evident, therefore, that those muffler statutes, which penalize the operators of all types and classes of motor vehicles if any motor vehicle is not equipped with a muffler which prevents "excessive and unusual noise and annoying smoke", affect literally millions of motorists throughout the United States who are subject thereby to repeated arrests and misdemeanor prosecutions for violations of these statutes, if each operator has not divined clearly what each law enforcement officer considers to be "excessive or unusual noise or annoying smoke."

The Supreme Court of the United States has held repeatedly that due process of law as guaranteed citizens of the United States by the Fourteenth Amendment of the United States Constitution imposes the obligation upon each State to frame its criminal statutes, whether felony or misdemeanor, in such manner and with such definiteness that persons of ordinary intelligence who are subject thereto may determine in advance with reasonable certainty what standard of conduct is required to comply with or which would be violative of penal statutes.

Jordan v. *De George*, 341 U. S. 223, 230, 95 L. Ed. 886; *Musser* v. *Utah*, 333 U. S. 95, 97, 92 L. Ed. 562, 68 S. Ct. 397; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 83 L. Ed. 888, 59 S. Ct. 618; *Cline* v. *Frink Dairy*, 274 U. S. 445, 458, 71 L. Ed. 1146; *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126; *U. S.* v. *Cohen*

Grocery Co., 255 U. S. 81, 65 L. Ed. 516, 41 S. Ct. 298; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 53 L. Ed. 417, 29 S. Ct. 220.

The opinions of the Court of Criminal Appeals herein are even more ambiguous, uncertain, and confusing than the muffler statutes involved. The original opinion of the Court recognizes that there is no legislative definition of the terms "excessive," "unusual," and "annoying," that the legislative concept of the type and quality of noise and smoke sought to be prohibited is not otherwise specified in any other statute, that the dictionary definitions of those terms are as general as the terms themselves, and that there is no generally accepted reasonably specific meaning of any of those terms with respect to exhaust noise or smoke. Accordingly, the Court was compelled to revert to a definition of the term "minimize" as used in the statute defining a muffler, but was then compelled to modify that definition as applied to exhaust noise and smoke; and then tacitly concede that a person of ordinary intelligence—the ordinary citizen—could not be expected to know the extent to which exhaust noises of a motor may be reduced without serious impairment of the efficiency of the motor, because the Court expressly states that such amount "is a question for experts in that field." The opinion is ambiguous because the opinion does not make clear whether the Court contemplates "the experts" to be (a) in the field of acoustics, (b) in the field of automotive engineering, or (c) some other field or combination of fields; nor does the opinion make clear the manner in which the Court contemplates that the answers of the experts should be determined, whether (a) by unanimous agreement, (b) a majority view, or (c) the expression of opinion of any individual expert in any court proceeding.

It appears also that the Court of Criminal Appeals opinion on motion for rehearing is in direct conflict with the

original opinion since the original opinion concludes that the determination of the amount of exhaust noise which is excessive or unusual is for experts in the field, whereas the opinion on rehearing is equally positive in stating that this matter should be evidenced "by any person familiar with the sound of an automobile as it is propelled upon the streets or highways by its own internal combustion." The two opinions of the Court of Criminal Appeals herein are comparable to the fabulous carnival shell game where you can risk your money and guess which shell hides the pea! It seems evident that neither opinion of the Court of Criminal Appeals herein clarifies with reasonable certainty for persons affected by the Texas muffler statutes the question of what quantity or quality of exhaust noise and smoke is excessive, unusual and annoying.

If the opinion of the Court of Criminal Appeals on motion for rehearing is controlling and the quantity and quality of exhaust noise and smoke is a matter to be evidenced by "any person familiar with the sound of an automobile as it is propelled upon the streets or highways by its own internal combustion," the standard of conduct required to comply with the muffler statutes or which would be violative of those statutes is variable and is not uniform in its application to all persons operating motor vehicles equipped with mufflers on the public highways.

It is a matter of common knowledge of which the Supreme Court can take judicial notice that various types and classes of motor vehicles in general use throughout the United States today are equipped with different types of mufflers, as produced by different manufacturers and selected by the manufacturers of the various types and classes of motor vehicles, and that mufflers which are stock equipment on all manufactured motor vehicles reduce exhaust noise and exhaust smoke to varying degrees.

BLEED THROUGH POOR COPY

It is respectfully submitted that the Texas muffler statutes in themselves, and as construed by the Court of Criminal Appeals herein, do not define with reasonable certainty what amount and quality of exhaust noise and smoke is lawful, and what amount is prohibited by the muffler statutes. If each expert in each case, or if each jury in each case, is to determine in each specific case whether the muffler on the vehicle of each defendant prevents excessive and unusual exhaust noise and annoying smoke, the standard is variable and uncertain; but the legislature without undue difficulty could define with reasonable and specific certainty the extent to which exhaust noise and smoke must be reduced by providing a standard of sound volume measurement, by specifying that exhaust noise of motor vehicles shall not exceed X decibels, a standard of sound volume measurement which is generally known to be adopted and generally accepted by the qualified scientists in the field of acoustics.

It is respectfully submitted by appellant that the decisions and final judgment of the Court of Criminal Appeals herein are erroneous in holding that the Texas muffler statutes are not repugnant to the 14th Amendment of the United States Constitution; and that the questions presented by this appellant are substantial and of widespread public importance.

Respectfully submitted,

(S.) HARRY S. POLLARD,

Littlefield Building,

Austin, Texas,

Counsel for Appellant,

WILLIAM FORREST TRAFTON.

May 10, 1954.

APPENDIX "A"

Ex Parte William Forrest Trafton

No. 26,542

Appeal from Travis County

Opinion

This is an appeal from the order of District Judge Charles O. Betts refusing to discharge appellant Trafton and remanding him to the custody of the Chief of Police of Austin.

The charging part of the complaint under which appellant was convicted and fined in the Corporation Court alleged that he drove an automobile on an Austin street and ". . . did then and there unlawfully drive and operate said vehicle with a defective muffler attached thereto, and in constant operation, thereby causing excessive and unusual noise."

Appellant aptly states the issue for our determination as follows:

> "The sole question presented here is the constitutionality and validity of Article 797 of the Penal Code and Section 134a of Article 6701d, V.A.C.S., the penal muffler laws of Texas, which Appellant contends are unconstitutional, void, and inoperative for indefiniteness, in that it is impossible for a person of normal, ordinary intelligence to ascertain from those laws, or any other written law of the state, the amount or character of exhaust noise or smoke which is permissible and which is prohibited."

The question has not been previously before this court but has been determined contrary to appellant's contention by our civil courts in the very recent case of The Department of Public Safety vs. Buck, 256 S.W. 2d 642 (Civ. Ap. writ refused.)

As suggested, this court is vested with the authority to determine the validity of the statutes under attack as criminal statutes and is not bound by the holdings of our sister

POOR COPY

courts exercising civil jurisdiction. Such holdings are, however, persuasive and are entitled to our careful consideration.

Appellant points out that the Court of Civil Appeals, in the Buck case, held that any ordinary and interested person would have no difficulty in determining whether or not an excessive and unusual noise accompanied the operation of a motor vehicle, but did not attempt to define the legal standard for determining the exact meaning of the general term "excessive and unusual noise". He urges with much force the absence of a standard by which it may be determined whether the noise of a particular motor is excessive or unusual, suggesting that since all motor vehicles make some noise it is not possible for a person of ordinary intelligence to ascertain with reasonable certainty from the statutes mentioned, or from other written law of the state, how much noise constitutes "excessive and unusual noise" as that term is used in the statutes.

A resort to other penal statutes regarding the subject of motor vehicles and mufflers may furnish such a standard.

Art. 797a P.C. makes it an offense to operate on a public highway a motor vehicle or motorcycle which is not equipped with a muffler, or which is equipped with a muffler cut-out.

Art. 797b P.C. defines a "muffler cut-out" and a "muffler", the latter definition being as follows:

> "A muffler within the meaning of this Act is a device through which the escaping gases of the motor of a motor vehicle or motorcycle pass, designed to muffle or minimize the noise produced by the operation of such motor."

"Minimize" is defined by Webster as "to reduce to the smallest possible amount or degree".

The extent to which the exhaust noises of a motor may be reduced without serious impairment of the efficiency of the motor is a question for experts in that field. The law requiring the motor vehicle to be equipped with a muffler designed to reduce exhaust noises to the smallest possible amount must be construed in the light of the fact that some

noise is inevitable if the motor is operated, but it may be reduced to a certain minimum by the use of a device designed for that purpose and known as a muffler, without seriously interfering with its efficiency.

The requirement of Art. 797a and 797b P.C. are that the motor vehicle be equipped with a device designed to reduce the noise produced by the operation of such motor to the smallest possible amount and through which device the escaping gases of the motor must pass.

The statutes under attack require that every motor vehicle must have such a device in good working order and in constant operation "to prevent excessive or unusual noise".

We conclude that the term "excessive and unusual noise" as used in Arts. 797 P.C. and Sec. 134a of Article 6701d V.A.C.S. refers to noise in excess of the usual noise which would necessarily result from the operation of a motor when reduced to the minimum by a muffler such as is defined in Art. 797b P.C., in good working order and in constant operation.

We overrule the contention that the statutes in question are invalid for indefiniteness.

The judgment is affirmed.

WOODLEY, *Judge*.

(Delivered November 25, 1953.)

APPEAL FROM TRAVIS COUNTY

No. 26,542

Ex Parte WILLIAM FORREST TRAFTON

OPINION

On Motion for Rehearing

Appellant still insists that the statute herein under consideration is void for uncertainty and that one is not able to ascertain therefrom what offense he might commit by failing to comply therewith relative to the utilization of a muffler on a motor vehicle.

The statute defines a muffler as "a device through which the escaping gases of the motor of a motor vehicle or motorcycle pass, designed to muffle or minimize the noise produced by the operation of such motor," and also to prevent excessive or unusual noises, annoying smoke, and the escape of gas or steam.

In this day and time with millions of automobiles equipped with internal combustion engines traveling on the streets every hour throughout the day and night all over the country, it seems to us that practically all persons are familiar with the common sound of automobiles as the explosions utilized therein pass through the ordinary muffler. If it be a matter of common knowledge as to what those sounds are, measured by one's power of listening and not by the results of technical measurements, then we think that any person should know what the usual noise is that is made by such motors. If it be a matter of common knowledge, then the unusual noise could be established by any person familiar with the usual noise.

We think this matter should be evidenced by any person familiar with the sound of an automobile as it is propelled upon the streets or highways by its own internal combustion.

We find an analogy in Article 474, P. C., in which a person should be punished who uses loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek, * * * or rudely displays any pistol or other deadly weapon in a manner calculated to disturb the peace, etc.

This statute was passed prior to 1866 and is found back in the old Pascal's Digest (Gammel's Laws of Texas, Volume 5), as is shown by the decision in Ex parte Slawson, 139 Tex. Cr. R. 607, 141 S. W. (2) 609, in which case the disturbance statute (Art. 474, supra) was claimed to be vague, indefinite and uncertain and did not set forth in intelligible language that which is necessary to constitute the conduct that was complained of.

This matter was held in the Slawson case, supra, to be a statute unmistakably plain in its meaning and was sufficiently certain to inform the relator of the offense with which he stood charged.

Our Supreme Court, in Sisk v. State, 36 Tex. Rep. 496, relative to this act setting forth the disturbance of the peace, said:

> "'A somewhat novel question is presented by this record. The appellant, with one other, was indicted at the February term, 1871, charged with "rudely displaying pistols", and was tried, found guilty, and fined. The indictment was founded on the Act of October 20, 1866, which was intended to repeal and supercede art. 2012, Pas. Dig. It is insisted that the law is void for uncertainty and for want of completeness.
>
> "'Upon an examination of the law we do not so consider it. The law is unmistakably plain in its meaning, and in nowise subject to the hypercriticism passed upon it by the appellant's counsel. The judgment of the district court is affirmed.'"

We also find the words "loud" and "vociferous" defined in Thomason v. State, 98 Tex. Cr. R. 312, 265 S. W. 579, and both are held to be susceptible of an interpretation by an ordinary person. See also West v. State, 131 Tex. Cr. R. 191, 97 S. W. (2) 477.

We may use these holdings relative to the disturbance statute as analogous to the use of unusual and excessive noises as set forth in the statute under attack herein.

We think that under the general doctrine of upholding an enactment of the Legislature if it is capable of being clearly construed, as well as deference to the opinion of our brethren of the Supreme Court, as well as the Court of Civil Appeals in upholding the validity of this act, surely such should have some weight and persuasiveness with us, though not decisive alone of the matter; nevertheless, the comity between our courts should demand that we give them consideration at least.

Under the circumstances, we are of the opinion that our original judgment upholding this act is correct, and the motion for rehearing is therefore overruled.

GRAVES,
Presiding Judge.

(Delivered Jan. 13, 1954.)

BLEED THROUGH POOR COPY

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 10,103

THE DEPARTMENT OF PUBLIC SAFETY OF TEXAS, ET AL., *Appellants,*

vs.

THOMAS W. BUCK, JR., *Appellee*

From District Court of Travis County, 98th Judicial District, No. 92,383

HON. CHAS. O. BETTS, *Judge:*

Appellee, Thomas W. Buck, Jr., brought this suit individually and allegedly as a class suit against the Department of Public Safety, its officials, officers, employees, agents, and representatives (including all Sheriffs and Constables, and their deputies, of the several counties of Texas, and Chiefs of Police, and their police officers, of the several cities, towns and villages of Texas).

Appellee alleged that he and the class of persons in whose behalf he sued were the owners and operators of motor vehicles equipped with properly installed and properly operating Smithy mufflers, a type of motor vehicle muffler manufactured by Smithy Manufacturing Company of Los Angeles, California.

The relief sought was a declaratory judgment adjudging that the unaltered, unmodified and undamaged Smithy mufflers as manufactured by the company are not unlawful when properly installed and operated upon motor vehicles; adjudging that the muffler laws of Texas are unconstitutional and void because they are indefinite, vague and uncertain, and for a permanent injunction restraining the defendants from arresting and prosecuting owners of motor vehicles equipped with unaltered and unmodified Smithy mufflers, and from enforcing or attempting to enforce the muffler laws of Texas.

Various parties intervened as parties plaintiff.

The Department of Public Safety (apparently the only defendant cited) answered and has appealed from the judgment later described.

The trial was nonjury and the court held that portion of Art. 797, Vernon's Ann. P. C., providing that:

> "Every motor vehicle must have devices in good working order which shall at all times be in constant operation to prevent excessive or unusual noise, annoying smoke, and the escape of gas or steam."

and that portion of Art. 6701d, Vernon's Ann. Civ. St., providing that:

> "Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke . . ."

to be unconstitutional and void because vague, indefinite and uncertain.

The trial court's injunction provided that:

> ". . . all law enforcement officers in Texas, including the Department of Public Safety of Texas and the Public Safety Commission of Texas, their officials, officers, agents, employees, and representatives, and the Sheriffs and Constables and their deputies of the several counties of Texas, and the Chiefs of Police and their police officers of the several cities, towns and villages of Texas, be and each is hereby perpetually enjoined and restrained from causing or permitting the arrest and prosecution of operators of motor vehicles equipped with motor vehicle mufflers of the type as manufactured by Smithy's Muffler Manufacturing Company of Los Angeles, California, for alleged violation of the muffler laws of Texas when such mufflers are installed properly without modification or alteration and are not damaged to the extent that exhaust leaks are permitted to occur, and from disapproving and refusing to issue certificates of inspection to the operators of motor vehicles

equipped with mufflers as aforesaid, merely because such vehicles are equipped with said mufflers; . . ."

The Court of Criminal Appeals has not passed on the validity of the portions of Acts 797 and 6701d, Sec. 134, now before us and we recognize that that Court is vested with the authority to determine the validity of those articles as criminal statutes. However appellee asserts that his rights are affected by the operation of these statutes and has questioned their validity. It therefore becomes our duty to here determine their validity. *Gann* v. *Keith*, — Tex. —, 253 S. W. 2d 413.

We, of course, are to here view the statutes as defining a criminal offense, rather than a rule of civil conduct in support of a civil action. However, the statutes in question regulates the use of motor vehicles on public highways and streets,—to prevent excessive and unusual noise, and the escape of annoying smoke, gas or steam. It can be readily understood that the prohibited acts, if permitted, would seriously interfere with the safe use of our streets and highways and increase the dangers incident thereto. Even if the motor vehicle was not in operation on the public highways or streets the prohibited acts could conceivably disturb the peaceful enjoyment of adjacent property.

The standards by which penal statutes are to be measured are to be found in Arts. 1, 8 and 6, Vernon's Ann. P. C. These statutes respectively provide:

> "The design of enacting this Code is to define in plain language every offense against the laws of this State and affix to each offense its proper punishment.
>
> "Words which have their meaning specially defined shall be understood in that sense, though it be contrary to their usual meaning; and all words used in this Code, except where a word, term or phrase is specially defined, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed."

"Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it can not be understood, either from the language in which it is expressed, or from some other written law of the State, such penal law shall be regarded as wholly inoperative."

To meet the requirements of the foregoing statutes, and the Constitution, a penal statute must be sufficiently definite, clear and unambiguous to inform, with reasonable certainty, those subject to its provisions what they mean, and who is liable for punishment for its violation. Missouri, K. & T. Ry. Co. v. State, 100 Tex. 420, 100 S. W. 766; Railroad Commission v. Fort Worth & D. C. Ry. Co., Tex. Civ. App., 161 S. W. 2d 560, error ref. w. o. m. It is not necessary, however, that the statute set out or mention specifically all the ways that it may be violated. Ex parte Montgomery, 86 Tex. Crim. Rep. 636, 218 S. W. 1042.

As we understand appellants' argument and contention it is that the Smithy muffler when properly installed without modification or alteration and which are not damaged "do not cause or permit excessive, unnecessary, or unusual exhaust noise nor annoying exhaust smoke." They say in effect that when properly installed, and undamaged, the Smithy muffler constitutes a device sufficient to meet the requirements of the statutes. It may be conceded that any muffler could be so installed or so damaged that it would not prevent the noise, the escape of smoke, gas or steam prohibited by the statute.

A representative of the Department of Public Safety said no instructions had been issued to the Highway Patrol to make arrests for the use of any particular type or make of muffler, and denied any intent on the part of the Department to issue any order requiring a discrimination against the Smithy muffler as such.

Our inquiry then is directed to whether or not the statutes are void because they are vague, indefinite and uncertain.

"A penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as

BLEED THROUGH POOR COPY

as to convey to a person of ordinary intelligence an adequate description of the evil or mischief intended to be prohibited." Ex parte Frye, 143 Tex. Crim. Rep. 9, 156 S. W. 2d 531.

It is quite true that in civil actions the meaning of the term "excessive" is to be determined in the light of, and with reference to, the cause of action asserted. In a measure that test is applicable here—as applied to the operators of a motor vehicle. As to him the word is to be interpreted as descriptive "of the evil or mischief intended to be prohibited." Webster's New International Dictionary, 2d Ed., gives the following definition of the word "excessive":

> "Characterized by, or exhibiting excess, as: a. Exceeding what is usual and proper; over much. b. Greater than the usual amount or degree; exceptional, very great."

The word "unusual" simply means not usual, uncommon.

In rejecting the argument that a statute of the State of Idaho which declared it to be a misdemeanor for any person having charge of sheep to allow them to graze on a range previously occupied by cattle was void because indefinite, the Court said:

> "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited." Omaechevarria v. Idaho, 246 U. S. 343, 62 L. ed 763, 38 S. Ct. 323.

In Kovacs v. Cooper, 336 U. S. 77, 93 L. ed 513, 69 S. Ct. 448, 10 A. L. R. 2d 608, the Court upheld an ordinance of the City of Trenton, New Jersey, which declared it unlawful for any person to use or operate on the public streets, alleys or thoroughfares of the city any device which emits loud and raucous noises and which is attached to any vehicle operated or standing. The Court said:

> "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a

> passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Every motor vehicle when in normal operation necessarily makes some noise, emits some smoke, and permits gas or steam to escape to some extent. They are in constant operation on our streets and highways and even in the sparsely settled areas of our State they are operated daily within the hearing and view of the citizens.

We think any ordinary and interested person would have no difficulty in determining whether or not an excessive and unusual noise or offensive or excessive exhaust fumes accompanied the operation of a motor vehicle.

It is our opinion that the trial court erred in adjudging the statutes to be void, and in granting the injunction prayed for.

The judgment appealed from is reversed, the injunction is dissolved, and judgment is here rendered that appellee take nothing.

RAYMOND GRAY,
Associate Justice.

Reversed and rendered, injunction dissolved.
Filed: March 11, 1953.

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin

No. 10,103

On Appellee's Motion for Rehearing

The Department of Public Safety of Texas, et al., *Appellants*

vs.

Thomas W. Buck, Jr., *Appellee*

From District Court of Travis County, 98th Judicial District, No. 92,383

Hon. Chas. O. Betts, *Judge:*

In their motion for rehearing appellees say that we erred in our original opinion in holding Art. 797, Vernon's Ann. P. C. and Art. 6701d, Sec. 134, Vernon's Ann. Civ. St., to be constitutional, and further in dissolving the injunction because the trial court found as a fact that:

> ". . . motor vehicle mufflers of the type as manufactured by Smith's Muffler Manufacturing Company of Los Angeles, California, do not cause or permit excessive, unnecessary, or unsual exhaust noise nor annoying exhaust smoke, when installed properly without modification or alteration and which are not damaged to the extent that exhaust leaks occur, but such mufflers efficiently, adequately, and lawfully minimize exhaust noises and exhaust smoke: . . ."

Under well established and declared rules of equity jurisprudence it is clear that the trial court was without authority to issue the writ of injunction in the absence of the existence of two facts:

> "First, that such law is unconstitutional and void; second, that its enforcement constitutes a direct invasion of a vested property right of the complainants."

Ex parte Sterling, 122 Tex. 108, 53 S. W. 2d 294; Kemp Hotel Operating Co. v. City of Wichita Falls, 141 Tex. 90, 170 S. W. 2d 217. For further citations of authorities see: 24 Tex. Jur. and 10-year Sup., Injunctions, Sec. 46.

It being determined that the two statutes in question are valid it follows that the injunction was not authorized. Even if the property rights of appellees were invaded by valid criminal statutes it is for the courts created for the purpose of trying criminal cases to determine whether or not the facts constitute a violation of the criminal law, and the fact finding by the trial court in this case would not authorize the injunction.

We remain convinced that we were correct in our original opinion, and appellee's Motion for Rehearing is overruled.

RAYMOND GRAY,
Associate Justice.

Motion overruled.
Filed April 8, 1953.

APPENDIX "B"

ALABAMA: Title 36, Section 39, Code of Alabama, 1940, as amended by Act No. 517, General and Local Acts, 1949, page 754, provides as follows:

> "(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, by-pass, a muffler without baffles, or similar device upon a motor vehicle on a highway."

ARIZONA: Section 66-177, Arizona Code Annotated, 1939, 1952 Cumulative Supplement, provides as follows:

> "66-177. *Mufflers, prevention of noise.*—(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out,

bypass, or similar device upon a motor vehicle on a highway."

ARKANSAS: Ark. Stats. (1947) §§ 75-726, 75-727 and 75-728, provides as follows:

"Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway."

CALIFORNIA: Vehicle Code Section 673 provides as follows:

"Mufflers—Prevention of Noise. Any motor vehicle on a highway shall at all times be equipped with a muffler in constant operation to prevent any excessive or unusual noise and no such muffler or exhaust system shall be equipped with a cut-out, bypass or similar device. No person shall modify the exhaust system of a motor vehicle in a manner which will amplify or increase the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle."

COLORADO: Section 261, Chapter 16, 1935 Colorado Statutes Annotated, as amended (Ch. 79, P. 165, Session Laws of Colorado, 1951), provides as follows:

"§ 261. MUFFLERS, PREVENTION OF NOISE.—(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, and no person shall operate a motor vehicle on the highways equipped with a muffler cut-out, bypass or similar device."

CONNECTICUT: Section 1029c—1953 Supplement to Connecticut General Statutes provides as follows:

"Subsection (c) of section 2428 of the general statutes is repealed and the following is substituted in lieu

thereof: Each motor vehicle operated by an internal combustion engine shall be provided with a muffler or mufflers, or other suitable * * * exhaust system, designed to prevent excessive, unusual or unnecessary noise, which shall be maintained by the owner in good working order and in constant operation. No person shall use upon a motor vehicle a muffler or mufflers lacking interior baffle plates or other effective muffling devices, a gutted muffler, a muffler cut-out or a straight exhaust while such motor vehicle is being operated upon a street or highway. No person shall use on the exhaust or tail pipe of a motor vehicle any extension or other device which will cause excessive or unusual noise. All exhaust pipes carrying exhaust gases from the motor shall be constructed of leak proof metal tubing and shall be directed from the muffler or mufflers approximately parallel with the longitudinal axis of the vehicle and approximately parallel to the surface of the roadway, or upward to a location above the cab or body of the vehicle. On passenger vehicles exhaust pipes shall extend to the extreme rear end of such vehicles."

DELAWARE: § 4311, Title 21, Delaware Code of 1953 provides as follows:

"(a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise."

FLORIDA: Section 317.63, Florida Statutes, provides as follows:

"Mufflers, prevention of noise.—Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway."

POOR COPY

GEORGIA: Section 117, page 55, Uniform Act Regulating Traffic on Highways, Act 854, provides as follows:

"Section 117. MUFFLERS, PREVENTION OF NOISE—(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway, except that this section shall not apply to tractors.

(b) The engine and power mechanism of every motor vehicle shall be so equipped and adjusted as to prevent the escape of excessive fumes or smoke.

IDAHO: Chapter 273, Session Laws of 1953, Section 49-564.34, Idaho Code, provides as follows:

"49-564.34. MUFFLERS, PREVENTION OF NOISE.—(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway."

ILLINOIS: Illinois Revised Statutes 1953, Chapter 95½, Paragraph 213, provides as follows:

"Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass or similar device upon a motor vehicle on a highway."

INDIANA: Ch. 48, Sec. 148 of the Acts of 1939, the same being found in Burns' Indiana Statutes (1952 Repl.), Section 47-2230, provides as follows:

"Mufflers, prevention of noise.—(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to pre-

vent excessive or unusual noise and no person shall use a muffler cut-out bypass or similar device upon a motor vehicle on a highway.

Iowa: Section 321.436, Code of Iowa Laws 1950, provides as follows:

"Every motor vehicle shall at all times be equipped with a muffler in good working order and constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass or similar device upon a motor vehicle on a highway."

Kansas: Section 8-5, 103 of the General Statutes of 1949, provides as follows:

"Mufflers, prevention of noise. Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass or similar device upon a motor vehicle on a highway."

Louisiana: Sections 285 and 289 of Title 32, Louisiana Revised Statutes of 1950, provide as follows:

Section 289: "It shall be unlawful to drive a motor vehicle on a public highway unless it is equipped with a muffler preventing excessive or unusual noise or smoke."

Maine: Section 32 of Chapter 19 of the Revised Statutes of 1944, as amended, provides as follows:

"All motor vehicles shall be equipped with a muffler of such construction and device as to prevent excessive noise. No person operating a motor vehicle shall at any time open the muffler cut-out, or permit the exhaust to make any unnecessary noise."

Massachusetts: General Laws (Ter. Ed.) chapter 90, section 7, provides as follows:

". . . Every motor vehicle so operated shall be provided with a muffler or other suitable device to pre-

POOR COPY

vent unnecessary noise and with a suitable bell, horn or other means of signalling, and with suitable lamps; . . ."

MINNESOTA: M. S. A. 169.69 provides as follows:

"Every motor vehicle shall at all times be equipped with a muffler in good working order (which blends the exhaust noise into the overall vehicle noise) and (is) in constant operation to prevent excessive or unusual noise, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a street or highway. (The exhaust system shall not emit or produce a sharp popping or crackling sound.) Every motor vehicle shall at all times be equipped with such parts and equipment so arranged and kept in such state of repair as to prevent carbon monoxide gas from entering the interior of the vehicle."

MISSOURI: Motor Vehicle Traffic Regulations of the State of Missouri, Page 47, provides as follows:

"2. MUFFLER CUTOUTS: Muffler cutouts shall not be used and no vehicle shall be driven in such manner or condition that excessive and unnecessary noises shall be made by its machinery, motor, signaling device, or other parts, or by any improperly loaded cargo. The motors of all motor vehicles shall be fitted with properly attached mufflers of such capacity or construction as to quiet the maximum possible exhaust noise as completely as is done in modern gas engine passenger motor vehicles. Any cutout or opening in the exhaust pipe between the motor and the mufflers on any motor vehicle shall be completely closed and disconnected from its operating lever, and shall be so arranged that it cannot automatically open, or be opened or operated while such vehicle is in motion."

NEBRASKA: Section 39777 of the Revised Statutes of Nebraska provides as follows:

"(a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a

muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke."

NEW HAMPSHIRE: Revised Laws (1942), chapter 119, s. 23, provides as follows:

"No operator of any motor vehicle shall, in any way, permit any unreasonable amount of smoke to escape from such vehicle, nor permit said vehicle to make any unnecessary noise by cutting out the muffler or otherwise."

NEW JERSEY: New Jersey Statutes Annotated, paragraph 39:3-70 provides as follows:

"Every motor vehicle having a combustion motor shall at all times be equipped with a muffler in good working order and constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cutout, bypass or similar device upon a motor vehicle on a highway."

NEW MEXICO: The 1953 New Mexico Legislature by Chapter 139 enacted the Motor Vehicle Law, and Section 152 provides as follows:

"Mufflers, prevention of noise.—(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway."

NEW YORK: New York State Vehicle and Traffic Law, § 15 provides as follows:

"1. Every motor vehicle, operated or driven upon the public highways of the state, shall be provided with adequate brakes and * * *. Every such motor vehicle, also, shall have a suitable muffler or device to prevent unnecessary noise from exhaust gases, and the use of so-called "cut-outs" is prohibited. * * *

BLEED THROUGH POOR COPY

North Carolina: Section 20-128 of the General Statutes provides as follows:

"Prevention of noise, smoke, etc.; muffler cut-outs regulated.—(a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and smoke screens."

North Dakota: Section 39-1129 of the North Dakota Revised Code of 1943 provides as follows:

"Mufflers required: muffler cut-out prohibited. No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke. No person shall use a 'muffler cut-out' on any motor vehicle upon a highway."

Oregon: Subsection (a) of section 55-2618, Oregon Code 1935 Supplement, as amended by chapter 392, Oregon Laws 1937, provides as follows:

"(a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke.

Pennsylvania: Section 819 of The Vehicle Code of Pennsylvania, Act of May 1, 1929, P. L. 905, as amended by Section 2 of the Act of June 22, 1931, P. L. 751, 75 Purdon's Pennsylvania Statutes Annotated, 406, provides as follows:

"(a) No person shall operate a motor vehicle, except fire department and fire patrol apparatus, on a highway unless such motor vehicle is equipped with a muffler, in good working order, and in constant operation, to prevent excessive or unusual noise."

SOUTH DAKOTA: SDC 44.0350 § 49 Ch. 251, 1929, revised in form, provides as follows:

"PREVENTION OF NOISE, SMOKE, ETC.: MUFFLER CUT-OUTS REGULATED. No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke."

TENNESSEE: Section 2694, Williams Tennessee Code, Annotated, provides as follows:

". . . no person shall drive a motor vehicle on the highways of the State unless it is equipped with a muffler which prevents unusual noise or smoke annoyance. It is also a penal offense to use a muffler cut-out on motor vehicles on the highways of the State."

UTAH: Utah Code Annotated 1953 (41-6-147, U.C.A. 1953), provides as follows:

"(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass or similar device upon a motor vehicle on a highway.

VIRGINIA: 1932, p. 664; 1934, p. 406; Michie Code 1942, § 2154 (152) 1950, p. 699, provides as follows:

"§ 46-305. MUFFLER REQUIRED.—No person shall drive a motor vehicle upon a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and escape of excessive gas, steam or oil. All exhaust pipes carrying exhaust gases from the motor shall be directed parallel with the ground or upward.

WASHINGTON: RCW 46.36.050, Section 36, chapter 189, Laws of 1937, provides as follows:

"It shall be unlawful for any person to operate a motor vehicle which is not at all times equipped with a

BLEED THROUGH POOR COPY

muffler upon the exhaust thereof in good working order and in constant operation to prevent excessive or unusual noise and it shall be unlawful for any person operating any motor vehicle to use a cut-out, bypass, or similar muffler elimination appliance."

West Virginia: West Virginia Code, Chapter 17c, Article 15, Section 34, enacted by the 1951 Legislature, provides as follows:

"(a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway."

Wisconsin: Section 85.36, Wis. Stats. 1951, provides as follows:

"85.36 Prevention of noise and smoke. No person shall operate a motor vehicle upon any highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke."

Wyoming: Section 60-610 provides as follows:

"Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, bypass or similar device upon a motor vehicle on a highway."

E COPY

Office - Supreme Court, U. S.
FILED
SEP 18 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 115

WILLIAM FORREST TRAFTON,
Appellant,

vs.

STATE OF TEXAS,
Appellee.

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN BEN SHEPPERD
Attorney General of Texas

RUDY G. RICE
Assistant Attorney General

ROBERT O. FAGG
Assistant Attorney General
Capitol Station,
Austin, Texas

Attorneys for Appellee,
State of Texas

SUBJECT INDEX

	Page
Statement of Issues on Appeal	2
Statutes Involved	2
No Substantial Federal Question	3
Conclusion and Prayer	8

INDEX OF AUTHORITIES

Table of Cases:	Page
The Department of Public Safety v. Buck, 256 S. W. 2d 642 (Tex. Civ. App. 1953, error ref.)	3
Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902)	4
Kovacs v. Cooper, 336 U.S. 77 (1949)	4
McCullough v. Virginia, 172 U.S. 102 (1898)	7
McGahey v. Virginia, 135 U.S. 662 (1890)	7
Omaechevarria v. Idaho, 246 U.S. 343 (1918)	5
Roe v. Kansas, 278 U.S. 191 (1928)	6
Union Lime Company v. Chicago and Northwestern Railway Company, 233 U.S. 211 (1913)	6
Zucht v. King, 260 U.S. 174 (1922)	8

INDEX OF STATUTES

Texas Penal Code (Vernon 1948): Article 797	2
Texas Civil Statutes (Vernon 1948): Article 6701d, Section 134(a) and (b)	2, 3

CONSTITUTIONAL PROVISIONS

U. S. Const. Amendment XIV	2

POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 115

WILLIAM FORREST TRAFTON,
Appellant,

vs.

STATE OF TEXAS,
Appellee.

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 26,542

EX PARTE: WILLIAM FORREST TRAFTON

To The Honorable Supreme Court of the United States:

The Appellee in the above entitled cause for its statement in opposition to Appellant's statement as

to jurisdiction herein, and in support of Appellee's motion to dismiss or affirm, respectfully shows the following:

STATEMENT OF ISSUES ON APPEAL

The question sought to be presented in this appeal is Appellant's claim that Article 797, Texas Penal Code (Vernon 1948) and Section 134a of Article 6701d, Texas Civil Statutes (Vernon 1948) are each too vague and indefinite in that the phrases "excessive or unusual noise" or "annoying smoke" found in each of these statutes, do not sufficiently set a standard of conduct which would apprise a person of ordinary intelligence with reasonable certainty what standard of conduct is required to comply with such statutes, and therefore these statutes are repugnant to the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED

Tex. Pen. Code (Vernon 1948) Art. 797:

> "Every motor vehicle must have devices in good working order which shall at all times be in constant operation to prevent excessive or unusual noises, annoying smoke, and the escape of gas or steam. Pipes carrying exhaust gas from the engine shall be directly parallel to the ground or slightly upward. Devices known as 'Muffler cut-outs' shall not be used within the limits of any incorporated city or town or on any public highway where the territory contiguous thereto is closely built up. Any person violating any provision of this article shall be fined not to exceed one hundred dollars."

Tex. Civ. Stat. (Vernon 1948) Art. 6701d, Sec. 134(a) and (b):

> "Sec. 134. (a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke and no person shall use a muffler cut-out, by-pass, or similar device upon a motor vehicle on a highway.
>
> "(b) The engine and power mechanism of every motor vehicle shall be so equipped and adjusted as to prevent the escape of excessive fumes or smoke."

These claims of repugnancy the Appellee denies and the highest State court, the Court of Criminal Appeals of Texas in the opinion and judgment here challenged determined the question so raised by Appellant adversely to him. See Appellant's Statement as to Jurisdiction, Appendix "A", pages 12-16, wherein the opinions of the Court of Criminal Appeals of Texas are set out in full. (Opinions of the Court of Criminal Appeals are not yet published.)

This question has also been determined contrary to Appellant's contention by our civil courts in the very recent case of *The Department of Public Safety v. Buck*, 256 S.W. 2d 642 (Tex. Civ. App. 1953, error ref.). See Appellant's Statement as to Jurisdiction, Appendix "A", pages 17-24.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE ATTEMPTED APPEAL

The Appellant on page 2 of his Statement as to Jurisdiction cites several cases supporting the con-

tention that this Court will review a judgment on a direct appeal. However, there must be a substantial federal question raised which must be more than formal, and not so devoid of merit as to be frivolous, nor foreclosed by prior decisions of this court so as to leave no room for real controversy. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court upheld an ordinance of the City of Trenton, New Jersey, which declared it unlawful for any person to use or operate on the public streets, alleys or throughfares of the city any device which emits loud and raucous noises and which is attached to any vehicle operated or standing. The Court said:

> "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Appellant conveniently sets out in his Statement as to Jurisdiction in Appendix "B" at pages 24-33 the statutes from 36 states which are analogous to the Texas statutes involved herein. We call to the Court's attention the fact that each of these statutes uses substantially the same wording as contained in our Texas statutes, i. e. "excessive or unusual noises and annoying smoke" to define the provisions of this penal law. Appellant contends that the use of these

words is too vague and indefinite for the man of ordinary intelligence to be apprised of the offense. We submit that men of ordinary intelligence of 37 State legislatures (including Texas) knew the meaning to be conveyed by the use of "excessive or unusual noises or annoying smoke" when they met and wrote their laws. It should also be noted that almost all the statutes set out in Appendix "B" make the use of a "cut-out" illegal. The ordinary man has been familiar with the usual sound of motor vehicles for many years, and the definiteness of the statutes here involved cannot be denied.

An Idaho statute declared it to be a misdemeanor for any person having charge of sheep to allow them to graze on a range previously occupied by cattle. It was attacked on the ground that it was indefinite and void. The Court said:

> "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited." *Omaechevarria v. Idaho*, 246 U.S. 343 (1918).

We think any ordinary interested person would have no difficulty in determining whether or not an excessive and unusual noise or offensive or excessive exhaust fumes accompanied the operation of an automobile.

The Appellant on page 9 of his Statement to the Jurisdiction states "the ordinary citizen could not be expected to know the extent to which exhaust noises of a motor may be reduced *without serious impairment of the efficiency of the motor*,*" and fur-

* Emphasis added throughout.

ther states that the Court (Court of Criminal Appeals of Texas, Opinion on page 13 of Appellant's Statement as to Jurisdiction) expressly states that such amount "is a question for experts in that field." Appellant then states that the Opinion is ambiguous. We submit that the way Appellant has taken the sentence out of context he himself has created the ambiguity because a careful reading of the Opinion indicates that it is not the efficiency of the engine of an automobile that we are concerned about. That *is* for the experts. We are concerned with the noise as the man of ordinary intelligence knows it. The experts are those at the factories who determine the ratio between efficiency and noise, and they have been doing so for many years, and the ordinary man has been listening to these sounds for many years.

Two Texas State courts of last resort have already passed upon the validity of the statutes involved herein and the opinions are set out in full in Appellant's Statement as to Jurisdiction, pages 12-24. These statutes must be read in the light of the construction placed upon them by the State courts. *Union Lime Company v. Chicago and Northwestern Railway Company*, 233 U.S. 211 (1913). In *Roe v. Kansas*, 278 U.S. 191 (1928), the Plaintiff in error contended that legislation under which condemnation proceedings were being conducted conflicted with the Fourteenth Amendment. The Kansas statute involved provided that the power of eminent domain extended to any parcel of land which possesses "unusual historic interest." Plaintiff in error alleged that the statute did not adequately specify the reason for the condemnation and failed to reveal the use to

which the property would be put. The Kansas Supreme Court said, "The meaning of the statute is clear enough . . ." and the Shawnee Mission is a place invested with unusual historic interest, and the use is a public one. This Court stated at page 193 of its Opinion that, "Under the circumstances here revealed the construction placed upon her statutes by the Supreme Court of Kansas is binding upon us." In *McGahey v. Virginia*, 135 U.S. 662 (1890) the Court states at page 667:

> "In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon the court; but where the question raised is whether a contract has or has not been made . . ." the court going on to say that it may inquire and judge for itself.

And in *McCulloch v. Virginia*, 172 U.S. 102 (1898) at page 109, the Court states:

> "While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a State upon its statutes and consituation, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired."

We therefore urge upon this Court the construction placed upon these statutes by the courts of the State of Texas upholding the validity thereof.

We further submit that the question presented in this appeal has been so definitely determined that no

substantial question is presented by this appeal and therefore Appellant cannot invoke the jurisdiction of the Supreme Court of the United States. *Zucht v. King*, 260 U.S. 174 (1922).

CONCLUSION AND PRAYER

WHEREFORE, Appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Court of Criminal Appeals of the State of Texas be affirmed.

JOHN BEN SHEPPERD
Attorney General of Texas

RUDY G. RICE
Assistant Attorney General

ROBERT O. FAGG
Assistant Attorney General
Capitol Station,
Austin, Texas

Attorneys for Appellee,
State of Texas

A copy of this Motion, together with a copy of the letter of transmittal to the Clerk of the U. S. Supreme Court, have been mailed this date to the Honorable Harry S. Pollard, Littlefield Building, Austin, Texas, Attorney for Appellant, (First Class Postage Prepaid).

No. 115. TRAFTON *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted. *Harry S. Pollard* for appellant. *John Ben Shepperd*, Attorney General of Texas, and *Rudy G. Rice* and *Robert O. Fagg*, Assistant Attorneys General, for appellee. Reported below: 160 Tex. Cr. R. —, 271 S. W. 2d 814.